

Notes from the Field

Military Legal Practice Maxims A Potpourri of Random Thoughts

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Maxim I: To Be Effective, Judge Advocates Must Be Active, Not Passive, and Constantly Insert Themselves into the Planning and Execution Process

In the opening scene of the movie classic *Animal House*,¹ the two protagonists, Larry Kroger and Kent Dorfman, freshmen at Faber College,² visit the Omega house during the college's rush week. Omega is a staid, traditional, and ethnically homogenous fraternity comprised of the campus' most prominent students. Plainly deviating from the mold of Omega pledges,³ Larry and Kent are politely—but consistently—led to an out-of-the-way corner of the fraternity house occupied by students who, like them, are not “Omega material.”

Judge advocates⁴ run a similar risk of isolation in their relationships with commanders and staffs, particularly in the operational environment.⁵ The natural tendency is to consign judge advocates to “the corner” and to forget about them until legal problems arise. Unless properly conditioned by constant JAG presence and contribution, commanders and staff members naturally tend to ignore judge advocates. They only seek legal advice on issues they normally associate with attorneys (for example, military justice and legal assistance). And many who understand the role of judge advocates in military operations will avoid seeking JAG assistance for fear lawyers will impede their efforts.

Maxim II: The Office of the Staff Judge Advocate Is Not Just Another Staff Section, and a Legal Objection Is Not Simply Another Nonconcurrence or Recommendation

Judge advocates provide professional legal advice about all aspects of military operations.⁶ A judge advocate's determination that a particular course of action is *illegal* amounts to much more than a simple nonconcurrence or recommendation that the course of action be avoided. It is usually a “show stopper.” A commander should consider such advice seriously and never disregard it without discussing the ramifications and associated risks with the judge advocate.

Maxim III: A Judge Advocate's Role Is To Get the Command to Where It Wants To Go, Even If the Route Is Somewhat Different

It is easy and safe for judge advocates to say “No” whenever faced with a difficult or complex legal question. Judge advocates earn their money, however, by helping their commands accomplish their missions. Often this requires creative solutions reached by cobbling together disparate legal authorities. It may also mean offering commanders additional alternatives.⁷

1. NATIONAL LAMPOON'S *ANIMAL HOUSE* (Universal City Studios 1978).

2. College motto: “*Knowledge Is Good.*”

3. Larry and Kent are disparagingly referred to as the “wimp” and the “blimp” by Omega pledge hostess, Babs Jansen.

4. This Note uses the term JAG (Judge Advocate General) as an accepted term of art referring to a member or members of the Judge Advocate General's Corps.

5. Especially in operational settings, judge advocates must be prepared to cite the doctrinal basis for their presence in the planning cells. The recently revised *Field Manual 27-100* places operational law attorneys in command posts “to provide advice regarding [Rules of Engagement], [Law of War], and other [Operational Law] matters.” U.S. DEP'T OF ARMY, *FIELD MANUAL 27-100, LEGAL SUPPORT TO OPERATIONS*, para. 5.5.3. (1 Mar. 2000) [hereinafter FM 27-100]. They should also be prepared to sell the other unique skills they bring to the warfighting arena.

6. U.S. DEP'T OF ARMY, REG. 27-1, *JUDGE ADVOCATE LEGAL SERVICES*, para. 5-2a (3 Feb. 1995) (“The supervisory judge advocate will assist the commander by identifying legal problems and particularly in making legally acceptable decisions.”); *see also* FM 27-100, *supra* note 5, para. 1.1 (“The mission of the Judge Advocate General's Corps (JAGC) is to provide professional legal support at all echelons of command throughout the range of military operations.”).

For example, during the early stages of U.S. operations in Haiti, the U.S. Ambassador and the Commander in Chief (CinC), Atlantic Command, wanted a physical manifestation of the benefits of American troop presence on the island. They proposed using Humanitarian and Civic Assistance (HCA) funds to reconstruct a major highway running in front of the U.S. Embassy. Unfortunately, the project greatly exceeded the scope of HCA—which is limited to construction of *rudimentary* surface transportation systems.⁸ In advising the Ambassador and the CinC that HCA funds were unavailable, judge advocates offered the prospect that U.S. forces could effect the desired construction using other (albeit much different) authorities.

The resulting operation (later exercise), named FAIR-WINDS, was based on an agreement with the government of Haiti under § 607 of the Foreign Assistance Act.⁹ Under the agreement, Haiti, using funds from international donors, paid the costs of the construction materials; the U.S. paid the other costs associated with the operation, such as transportation, food, and salaries. Thus, U.S. military engineers got invaluable training by performing all types of construction (including the construction of the highway) in an austere environment; Haiti received the free expertise and labor of the engineers; and the Ambassador and CinC were able to point to the physical benefits derived from the American troop presence on the island.

Corollary A: Sometimes the Only Correct Answer Is “No”

Sometimes actions or desired ends are simply illegal. In such cases, judge advocates must have the intestinal fortitude to say “No.” When advising the command against a popular proposal, it is often helpful to explain the policy reasons behind the rules and to delineate the ramifications of violating the rules (for example, criminal sanctions).

Corollary B: Sometimes the Only Answer a Command or Staff Wants Is “No”

Commands and staffs occasionally receive a tasking they do not wish to—or cannot—perform. To avoid the tasking, they will occasionally look to judge advocates to “kill” it on legal grounds, rather than articulating to the commanding general or chief of staff their aversion to performing the task. This agenda is rarely stated outright, except in the forlorn looks of commanders or staff officers who discover that their judge advocates will not give them a “legal” way out of the tasker. If judge

advocates discern a legal objection, however, the only ones perceived as being obstructionist are the lawyers.

Corollary C: The Fact that a Course of Action Is Legal Does Not Mean It Is Wise—Even Legal Ideas Can Be Dumb.

Judge advocates should provide sound advice on all aspects of a command’s actions. Even if they find a particular alternative technically legal, they should not hesitate to counsel caution if the action is inadvisable because it lacks common sense, or is impolitic, unjust, or wasteful.¹⁰ Judge advocates should consider the second and third order effects of an action, such as the public affairs impact, the potential reaction of Congress, or the command’s or Army’s exposure to future litigation. In providing such counsel, however, judge advocates should be clear about what is legal advice and what is practical or business judgment.

Maxim IV: A Judge Advocate Must Capture All Available Facts Before Rendering Legal Advice

A “no-brainer!” Facts drive the resolution of issues. Advice based on incomplete or incorrect facts can lead to erroneous advice and may potentially force judge advocates to retract and re-issue opinions; an embarrassing predicament. Watch, however, spending too much time gathering facts, resulting in untimely legal advice (see Maxim V).

When rendering a legal opinion, prudence dictates a recitation of controlling facts exactly as the individual seeking legal advice has communicated them. In this way, the judge advocate’s advice is appropriately limited to the particular circumstance presented. This helps preclude an overly broad interpretation of a legal opinion and may stimulate a correction if the judge advocate received inaccurate or incomplete information.

Maxim V: Untimely Legal Advice Is Generally as Good as No Legal Advice at All

If advice arrives too late to be of any use, it is worthless (except, perhaps, as a basis for future advice). One of two things will have occurred: (1) the command will have taken action without the advice (in which case the judge advocate and his advice are irrelevant); or (2) the command will have aban-

7. See generally FM 27-100, *supra* note 5, para. 1.2.1.

8. 10 U.S.C. § 401(e)(2) (2000). The proposed project would have exceeded the entire HCA budgets of nearly all of the CinCs combined. Of course, any expenditure for construction beyond that authorized by HCA might have violated 41 U.S.C. § 12 (2000), which prohibits construction without explicit congressional authority, and—ultimately—the Anti-Deficiency Act, 31 U.S.C. § 1341 (2000). See The Honorable Bill Alexander, U.S. House of Representatives, 63 Comp. Gen. 422 (1984).

9. 22 U.S.C. § 2357 (2000).

10. See FM 27-100, *supra* note 5, para. 1.2.8.

doned the matter and taken no action at all (in which case the judge advocate and his advice are irrelevant).

Fact sheets, newspaper articles, and other local distillations of laws and regulations provide a proactive method of answering frequently asked questions in a timely fashion. Posting these to a webpage or common server can make them readily available to officials who need them.¹¹

Corollary A: Unless Confident in an Answer, Do Not “Shoot from the Hip.”

If a judge advocate does not know the answer to a question, he should say so, and conduct the research necessary. Blurting out a nonsensical answer is worse than asking for time to study the issue (see Corollary B). The law is complex. Libraries are filled with possible answers. It is generally not unreasonable to ask for time to check out a question.

Corollary B: Incorrect Legal Advice is Often Worse Than No Legal Advice at All

Incorrect advice is probably worse than no legal advice; it creates precedent (see Maxims XI and XII). It also leaves the judge advocate with responsibility for cleaning up the consequences of the erroneous advice (see Maxim XVIII).¹²

Maxim VI: A Judge Advocate Should Read Statutes and Regulations with a Dose of Common Sense, but Must Not Stretch Them Beyond Recognition

In interpreting law, judge advocates must avoid what Major General Huffman has termed “the law of unintended consequences.” Statutes and regulations should be read with their purpose in mind, but judge advocates should not interpret them out of existence.

When a proposed action violates a regulation or policy but not a statute, judge advocates may have to explain the risks attendant to the proposed course of action. There is a commonly held belief that violation of a “mere” regulation is with-

out consequence. This is expressed in the often repeated phrase, “regulations are only guidance.”¹³ A judge advocate’s analysis should include a determination of whether the regulation implements statute, whether the regulation’s proponent might grant a waiver,¹⁴ and whether ignoring the regulation has potential second and third order effects. For example, a proposed action may set an unappealing precedent. It may also lead to complaints to Congress, the Inspector General, or the press. Such complaints may lack immediate ramifications, but may arise during the congressional confirmation of senior officers. General officers and those who hope to become general officers may gain a new appreciation for judge advocates if they view them as staff officers who are looking out for their careers.

Corollary A: Particular Caution is Required When Interpreting Ethical Rules and Statutes or Regulations that are Criminal or Punitive in Character.

Judge advocates must exercise particular caution when dealing with criminal or punitive statutes and regulations. Playing it “cute” could get a command or a judge advocate in serious trouble.

Corollary B: Judge Advocates Do Not Make the Law, They Interpret and Apply It.

Judge advocates are neither legislators nor (usually) policy makers. They take the law as they find it. For this reason, judge advocates should not apologize for advice based on the sound interpretation of statutes, cases, and regulations.

Maxim VII: There Is a Statute, Directive, Regulation, Rule, Policy, Instruction, or Letter Covering Almost Every Issue

This is an exaggeration: there may be exceedingly narrow issues not touched by some law or policy, but there are not many.¹⁵ The point is that, unless they are intimately familiar with the particular question at hand, judge advocates act at their peril when they afford issues only a cursory review and deem the matters “OK to them” or “inoffensive.”

11. The judge advocate mission includes preventive law. Judge advocates must “be aggressive and innovative in disseminating information to soldiers and their families that is responsive to potential legal problems and issues . . .” See AR 27-1, *supra* note 6, para. 5-3.

12. Nevertheless, judge advocates will occasionally find themselves in disagreement with their own prior opinions or the opinions of a predecessor. “Graceful clarification” or “tactful changes” may be necessary.

13. An explanation of the various types of Department of Defense issuances that comprise policy guidance is available at <http://web7.whs.osd.mil/general.htm>.

14. Regulatory waivers have become easier to secure. The creation of “reinvention centers” and “reinvention laboratories” has lead to many delegations of waiver authority. Information about the reengineering process is available at http://freddie.forscom.army.mil/reeng/Initiatives/forscom_reinvention.htm.

15. *E.g.*, U.S. DEP’T OF ARMY, REG. 360-61, COMMUNITY RELATIONS, para. 13-7c (15 Jan. 1987) (prohibiting the use of Army aviation assets to transport Santa Claus, the Easter Bunny, and witches); U.S. DEP’T OF ARMY, PAM. 290-5, ADMINISTRATION, OPERATION, AND MAINTENANCE OF ARMY CEMETERIES, para. 2-12 (1 May 1991) (prohibiting the burial of animals and fowl in Army cemeteries).

Maxim VIII: It Is Dangerous To “Pigeon-Hole” Actions

The law is multidisciplinary. A single action may contain a multitude of legal questions. By categorizing an action within one particular area of the law, judge advocates can easily miss issues. They should be especially sensitive to fiscal issues (which are seemingly embedded everywhere) and relatively obscure statutes that appear with disconcerting regularity, such as the Federal Advisory Committee Act (FACA)¹⁶ and various environmental laws.

Corollary: Two Judge-Advocate Brains are Better than One; More are Even Better.

In addressing actions, particularly those that are unfamiliar, judge advocates should (given time constraints; see Maxim V) consult attorneys in their office, in other offices, or in the technical chain, including those with unique specialties, thereby ensuring a wide-ranging review of the action. In short, do not try to be the “Lone Ranger.”

Maxim IX: On Questions Concerning the Expenditure of Appropriated Funds, Commanders Must Ask “Show Me Where It Says I Can Do This” Rather Than “Show Me Where It Says I Can’t”

Under the Constitution, Congress *alone* has the power to authorize spending the federal government’s money.¹⁷ Consequently, commanders must have *affirmative statutory* authority before they may spend public funds. That their actions may not be specifically prohibited by law is irrelevant; if they cannot

find authority for their actions in statute, they may not act.¹⁸ In expending government money, commanders should insist that their judge advocates provide a statutory basis for the expenditure.¹⁹

Expenditures not falling within affirmative statutory authority run afoul of the Purpose Statute,²⁰ which restricts the use of public funds to the object or objects for which Congress appropriated them. Violation of the Purpose Statute does not necessarily trigger adverse consequences, provided proper funds are available for the expenditure. Where, however, no other funds are authorized for the purpose in question (or those funds have been exhausted²¹), the expenditure violates the Anti-Deficiency Act,²² which carries criminal penalties.²³

Corollary: The Maxim that “It’s Easier to Get Forgiveness than Permission” Does Not Apply to the Expenditure of Appropriated Funds

If no funds are authorized or available for the purpose for which the funds were spent, no one in the executive branch of the federal government has the power to grant forgiveness.

Maxim X: The Fact a General Officer’s Name Is Invoked To Stress the Importance of “Favorable” Legal Advice Does Not Make an Action Legal

Nearly every experienced judge advocate has faced the wrath and frustration of a staff officer who, feeling impeded by legal advice, invokes the name of a general officer (GO) in an

16. Pub. L. No. 92-463, 86 Stat. 770, (1972) (reproduced at 5 U.S.C. app. §§ 1-16 (2000)). The FACA is the statute ignored by the President’s Task Force on National Health Care Reform, with embarrassing consequences. *See* Association of American Physicians and Surgeons, Inc. v. Clinton, 997 F.2d 898 (D.C. Cir. 1993).

17. U.S. CONST. art. I, § 9, cl. 7 (“No money shall be drawn from the Treasury, but in Consequence of Appropriations made by law . . .”).

18. “The established rule is that the expenditure of public funds is proper only when authorized by Congress, not that public funds may be expended unless prohibited by Congress.” *United States v. MacCollom*, 426 U.S. 317, 321 (1976).

19. For lump sum appropriations, such as the Army’s Operation and Maintenance (O&M), discerning statutory intent may be more difficult. *See* Department of Defense Appropriations Act for Fiscal Year 2000, Pub. L. No. 106-79, tit. II, 113 Stat. 1214 (1999); National Defense Authorization Act for Fiscal Year 2000, Pub. L. No. 106-65, § 301, 113 Stat. 556 (1999). In determining intent, judge advocates should look to other “organic” legislation. *See, e.g.*, 10 U.S.C. § 404 (2000) (foreign disaster assistance); *id.* § 2805(c) (minor construction). Legislative history and Government Accounting Office (GAO) opinions are also fertile sources of guidance on O&M expenditures. *See, e.g.*, The Honorable Bill Alexander, U.S. House of Representatives, 63 Comp. Gen. 422 (1984) (construction during military exercises); *see generally* GENERAL ACCOUNTING OFFICE, 1 PRINCIPLES OF FEDERAL APPROPRIATIONS LAW 4-5 (2d ed. 1991).

20. 31 U.S.C. § 1301(a) (2000).

21. Official representation funds (ORFs or .0012 funds) are a prime example of funds in exceedingly short supply. The ORFs are O&M funds found in the emergency and extraordinary (E&E) expense appropriation. They are limited by the annual ceiling on E&E expenses and generally subject to additional formal subdivisions. *See* 10 U.S.C. § 127; Department of Defense Appropriations Act for Fiscal Year 2000, Pub. L. No. 106-79, tit. II, 113 Stat. 1216 (1999); U.S. DEP’T OF ARMY, REG. 37-47, REPRESENTATION FUNDS OF THE SECRETARY OF THE ARMY, para. 1.1 (31 May 1996); *see also* 1 PRINCIPLES OF FEDERAL APPROPRIATIONS LAW, *supra* note 19, at 4-110. Because other O&M funds may not be used for representational functions, and ORF amounts are always small, commanders can easily, if not careful, overspend their allotted ORFs, thereby violating the Anti-Deficiency Act. *See* Matter of: HUD Gifts, Meals, and Entertainment Expenses, 68 Comp. Gen. 226 (1989); To The Administrator, Veterans Administration, 43 Comp. Gen. 305 (1963); Comptroller General McCarl to Capt. Carl Halla, United States Army, 5 Comp. Gen. 455 (1925).

22. 31 U.S.C. § 1341.

23. *Id.* § 1350.

effort to secure a “green light.” Assuming the advice is correct, invocation of the GO’s name does not change the result.

Corollary: What a GO Wants and How His Staff Interprets What He Wants Are Not Necessarily the Same

It is surprising how often a GO’s name is invoked in vain and what is attributed—often falsely—to him.

Maxim XI: Precedent (“We’ve Always Done It This Way”) Is Not Legal Authority if the Way It Has Always Been Done Is Unlawful

Particularly when judge advocates are new to a unit, they will hear “we’ve always done it that way” in response to concerns about the lawfulness of an action. If the way it has always been done is illegal, it remains illegal regardless of the precedent.

Corollary A: Always Take Claims of Precedent with a “Grain of Salt”

Further inquiry into assertions of precedent often reveals that “it’s *never* been done that way.”

Corollary B: Before Rendering an Opinion, Always Check the Office Files

Judge advocates can often save time by looking at their predecessor’s work. He was likely a talented individual. Moreover, if judge advocates disagree with a predecessor’s opinions, it is usually better to know that the opinion was issued than to be “blind-sided” by a commander brandishing it.

Maxim XII: The Fact Another Command Does Something (“Fort ____ Does It This Way”), Is Not Legal Authority if The Action Is Unlawful.

This assertion is especially problematic if true. It could mean that either you or the other command is wrong. It could also reflect a difference in the interpretation of an ambiguous statute or regulation or simply a different factual setting. Call the other command to determine the basis of the disagreement. If possible, reconcile the inconsistency. Consult the technical chain if necessary. Ultimately, judge advocates must render their own advice and, if convinced of the correctness of their position, cannot be bound by another command’s advice or actions.

Corollary A: There Is No “Fort Bragg Exception” to Statutes and Regulations

And for those at Fort Bragg, there is no “Fort Hood Exception” to statutes and regulations either.

Corollary B: Always Take Assertions of What Another Command or Service Does with a “Grain of Salt”

Further inquiry into assertions that another command does something often reveals: (1) that the command does *not*, in fact, do anything of the sort; or (2) that the circumstances are vastly different (see, for example Maxim IV).

Maxim XIII: A Predecessor’s Position Is Not Legal Authority if that Position Is Unlawful

A favorite means used by “old timers” in command or on staffs to deal with newly arrived judge advocates is to assert that their JAG predecessors gave a “favorable” opinion on a particular issue. This tack is popular because: (1) it suggests new judge advocates are out of touch with the true state of the law; (2) it makes new judge advocates feel they are not being team players (unlike their predecessors); and (3) it puts pressure on new judge advocates to render “favorable” legal advice to become trusted members of the team. If the position taken by a predecessor is unlawful, however, it remains unlawful upon his or her departure. Of course, it is much easier to ignore this kind of an appeal if the predecessor was a “bozo” as opposed to a “superstar.” (*Assignment Maxim: It is not the job that is important, but the person whom you replace.*)

Corollary: Always Take Assertions of a Predecessor’s Position with a “Grain of Salt”

See Corollaries to Maxims X, XI, and XII. It is reassuring to learn that—almost uniformly—a predecessor’s position was the same as your own.

Maxim XIV: Threats, Bullying, and Intimidation Do Not Constitute Legal Authority

This is axiomatic. The unlawful does not suddenly become lawful because the recipient of the unwanted legal advice shouts, curses, or threatens.

Maxim XV: Desperation Does Not Constitute Legal Authority

Late or urgent requests for a legal “chop” (usually because a staff officer has failed to seek timely advice) do not turn unlawful actions into lawful ones. Judge advocates should not be pressured into rendering shoddy advice to accommodate a poorly staffed action (see Maxim XVIII).

Maxim XVI: Ignorance Does Not Constitute Legal Authority

The fact the command does not consult a judge advocate is not an excuse for an unlawful action.

Maxim XVII: “X” Number of “No’s” Do Not Equal One “Yes.”

It is kind of like a multiple choice exam: the fact you have marked five “A’s” in a row does not mean the next answer has to be “B,” “C,” “D,” or “E,” if the correct answer to the next question is, in fact, “A.” Judge advocates should not feel compelled to give a legal nod to an action of questionable legal authority simply because they have deemed several prior actions legally objectionable.

Corollary: Practicing Law Is Not a Popularity Contest

Face it: judge advocates are lawyers! People will regard them with disdain no matter what advice they give. Although clients may perceive judge advocates with kindness when receiving a favorable opinion, the perception is both illusory and transitory. Judge advocates are still lawyers. And the next time judge advocates give advice that is not equally favorable, the traditional animosities will reveal themselves again. A judge advocate’s goal should be respect, not love.

Maxim XVIII: Staffs Generally Seek JAG Advice Simply to “Check” the Coordination Box; Judge Advocates Ultimately Pay the Price of Deficient Opinions

Staff officers generally seek legal advice because “JAG” constitutes a block or line on the coordination checklist, and they want the actions complete and off their plates. Staff officers usually do not care if the legal advice is correct or incorrect, as long as the block for legal review gets checked. If something goes wrong because the action is unlawful, staff officers have the top-cover they need—the “JAG chop.” The judge advocates who render the incorrect advice will confront the consequences alone.

Maxim XIX: Before Giving Advice, Know Who Is in the Room

Not everyone in the room is a “friend” or has the same agenda as the judge advocate and his client. It is sometimes difficult to identify everyone in a meeting. For example, contractors are often indistinguishable from civilian employees. Indeed, contractors who happen to be members of a Reserve Component have been known to attend meetings in uniform, thereby making it easy to mistake them for military personnel. Thus, be cautious before speaking.

Maxim XX: When Providing a Written Legal Opinion, Put the “Bottom Line” Up Front (“BLUF”)

Legal opinions are not murder mysteries. If forced to read a long, generally boring opinion all the way to the end before reaching the conclusion, many commanders and staff officers will simply stop reading.

Corollary A: When Providing a Written Legal Opinion, Include Well-Reasoned, Well-Documented Bases for the Conclusions Reached.

This corollary is potentially controversial. Two schools of thought exist about the extent to which judge advocates should spell out the rationale for their opinions. Some opt for the conclusion alone, with a possible reference to the controlling authority. Personally, the authors prefer a comprehensive legal opinion that states, in gory detail, the reasons and authority for the conclusion. Such opinions are more likely to be taken seriously (and less likely to be questioned), particularly if the subject matter is charged with emotion.

Corollary B: Even the Gory Details Should Be Written in Simple Terms and Plain English

In the long run, commanders will appreciate the judge advocate who educates them more than the judge advocate who shows them how smart he is.

Maxim XXI: Do Not Permit Shoddy Staff Work To Go Forward; Offer To Help Rewrite It if Necessary

Written and oral communications are the “weapons platforms” of judge advocates. They have been schooled in writing and practice it everyday. Other staff officers generally do not have the benefit of our training or practice; their focus is on other areas (about which most judge advocates know little). A simple “no legal objection” or “legally objectionable” is sometimes not enough. Judge advocates should assist fellow staff officers in formulating well-written and cogent products. Particularly when judge advocates find legal objections, they should help craft the action to pass legal muster.

Corollary A: If Judge Advocates Do Their Job Well, Commanders and Staffs Will Use Them as “Ghostwriters” and Common-Sense “Checks”

One of the highest compliments commanders and staff can pay judge advocates is to use them to help prepare their written products and to serve as common-sense checks on their actions. If asked to serve in such a capacity, however, judge advocates must always remember their role is to provide support; they are not the decision-makers. Moreover, the adage “it’s amazing how much work gets done if no one is concerned about who gets the credit” is especially apropos. While “face time” can be a heady experience (no pun intended), judge advocates work best when they work in the background. Credit is unimportant; getting the job done is.

Corollary B: Beware of Being Overwhelmed by Staff Work

This might also be phrased “no good deed goes unpunished.” If judge advocates assume the work of others, they should expect to continue receiving such work. The danger is that they may become overwhelmed. Their role is to assist, not to lead.²⁴

Maxim XXII: Staff Judge Advocates Must Always Have Direct Access to Commanders To Discuss Legal Issues Affecting the Command

Article 6(b) of the Uniform Code of Military Justice²⁵ mandates that, on military justice matters, convening authorities must—at all times—communicate directly with their staff judge advocates (SJA). Neither the chief of staff nor any other officer may act as a “gatekeeper.” With regard to matters outside of the military justice arena, SJAs should (in most instances) attempt first to resolve problems at the lowest level possible; however, they must also have the ability to speak directly with their commanding generals about such matters. If, in spite of the SJA’s advice, the staff or a subordinate commander is about to take the command down a path fraught with legal perils, the SJA has an obligation to alert the commanding general, laying down his or her concerns (see Maxim II).

24. Commanders rarely object to being asked to exercise their authority to delegate work. If judge advocates have mastered the process of solving a particular problem or reaching a certain goal, they should ask the commander to form a process-action team, advise the commander who should be players, and have the commander assign tasks and suspenses. The commander gets credit for successful results, and the judge advocates earn “brownie points” for helping the commander.

25. UCMJ, art. 6(b) (2000) (“Convening authorities shall at all times communicate directly with their staff judge advocates or legal officers in matters relating to the administration of military justice . . .”).

26. See, e.g., U.S. DEP’T OF DEFENSE, INSTR. 1000.15, PRIVATE ORGANIZATIONS ON DoD INSTALLATIONS, para. 4 (23 Oct. 1997); U.S. DEP’T OF DEFENSE 5500.7-R, JOINT ETHICS REGULATION, paras. 3-200, 3-201, 3-202, 3-206, 3-209, 3-210, 3-211 (Aug. 1993) [hereinafter JER]; U.S. DEP’T OF ARMY, REG. 1-211, ADMINISTRATION: ATTENDANCE OF MILITARY PERSONNEL AT PRIVATE ORGANIZATION MEETINGS (1 Dec. 1983); U.S. DEP’T OF ARMY, REG. 360-61, COMMUNITY RELATIONS, paras. 2-3, 3-1, 3-4, 5-1, 5-2, 5-3, 5-4, 5-5, 5-6 (15 Jan. 1987).

27. See JER, *supra* note 26, paras. 3-209, 3-210.

28. Given the fact endorsement of private organizations, including their membership drives, in an official capacity violates punitive provisions of the Joint Ethics Regulation, judge advocates *must* insist on compliance to protect their commands.

Corollary A: While Not Statutorily Based, Trial Counsel Must Have Similar Access to the Commanders Whom They Advise

By its terms, article 6 does not afford judge advocates, other than SJAs, direct access to commanders on military justice matters. To be effective, however, trial counsel must have unimpeded and unfiltered contact with their commanders.

Corollary B: Before Informing the Commanding General of a Legally Objectionable Course of Action Proposed by a Subordinate, Alert the Subordinate

This may not change the subordinate commander’s mind, but it will help maintain a working relationship.

Maxim XXIII: No Private Organization—No Matter How Laudable Its Cause—Is Worth Violating the Law to Assist

No issue is more filled with emotion than the treatment of private organizations, particularly those perceived to serve the interests of the Army and its soldiers. These private organizations are not, however, part of the U.S. Army, and the support the Army may provide them, both material and moral, is limited.²⁶ Particularly problematic is the impulse to endorse certain private organizations or to encourage membership through official channels. Such activities are flatly inconsistent with regulation,²⁷ and judge advocates are usually the only members of a unit or installation willing to dampen the ardor for these groups, a position that is unlikely to endear them to their commands.²⁸

Maxim XXIV: If You Are Not Having Fun Practicing Law in the JAG Corps, You Should Be a Civilian—Where at Least You Can Make More Money

People enter the JAG Corps for all sorts of reasons—the desire to serve one’s country, Reserve Officer Training Corps (ROTC) commitments, adventure, travel, love of camouflage—but money is not one of them. Aside from what brought you here, the greatest advantage the Army has over private practice

is the Army is fun while private practice generally is not. Judge advocates need not worry about billing hours, collecting fees, finding clients, keeping clients, taking time off, or selecting something different to wear each day. They get paid for keeping physically fit, practicing marksmanship, camping out, traveling to exotic places, and belonging to an organization that is much larger than any one individual. Consequently, if you are not having fun in the JAG Corps, go for the money.

SOFA Claims Initiatives in Korea

Major Imogene M. Jamison²⁹
Branch Chief
Defense Appellate Division
U.S. Army Legal Services Agency

You have just been assigned as a new claims attorney with the claims office in Yongsan, South Korea. Your supervisor walks into your office and tells you that a U.S. service member rear-ended a Korean citizen's private automobile while driving a government vehicle off-post. The Korean National Police cited the service member as being at fault. The Korean citizen experienced both property damage and serious personal injuries. This news does not surprise you, however, because you are aware that driving in the Republic of Korea (ROK) is a unique, challenging, and often dangerous experience for many.

The service member has private liability insurance that covers accidents involving the use of his privately owned vehicle, but his insurance does not cover instances where he is driving a government vehicle. You anticipate that the Korean citizen will file a claim against the U.S. government. What is the claims office's role in this process? Are there any ways to expedite the foreign claims process to ensure a good working relationship with the ROK government and its people? This note helps answer these questions for new claims attorneys and explores how claims are processed in the ROK. It also describes initiatives that are currently being discussed by the United States and

the ROK to expedite the processing of foreign claims in South Korea.

Background

In 1966, the U.S. government entered into a Status of Forces Agreement (SOFA) with the ROK.³⁰ The SOFA provides for the payment of foreign claims against the United States filed by the ROK government or its citizens for property damage and personal injuries that are caused by U.S. service members or Department of Defense (DOD) civilian employees.³¹ Article XXIII of the SOFA categorizes claims based on the duty status of the alleged wrongdoer at the time of the incident that gives rise to the claim. Claims that arise from the negligent or wrongful acts or omissions of members or employees of the U.S. armed forces done in the performance of official duties are commonly referred to as SOFA scope claims.³² The vast majority of all SOFA scope claims result from traffic accidents and maneuver damage.³³

Claims that arise from negligent or wrongful acts outside of the scope of the performance of official duties are called SOFA non-scope claims, and are governed by paragraphs six and seven of Article XXIII.³⁴ There are many different types of non-scope claims. For instance, a non-scope claim may arise when a U.S. service member or employee, driving his privately owned vehicle or a U.S. vehicle without authority, causes a traffic accident with a Korean citizen.³⁵ Other examples of tortious acts or omissions that might give rise to liability include assaults on Korean citizens, failing to pay bills such as telephone bills or rent for off-post quarters, or when a servicemember is responsible for damages to third parties because of environmental destruction due to oil, waste, or other materials.

Under the SOFA, both South Korean citizens and the ROK government must file any claims they have against the United States with the ROK Ministry of Justice (MOJ).³⁶ These claims are then processed according to South Korean law. The

29. The author served as the Deputy Commander, United States Army Claims Service, Yongsan, Republic of Korea from January 1999 to June 2000.

30. Agreement Under Article IV of the Mutual Defense Treaty Between the United States of America and the Republic of Korea, Regarding Facilities and Areas and the Status of United States Armed Forces in the Republic of Korea, July 9, 1966, U.S.-S. Korea, 17 U.S.T. 1677 [hereinafter SOFA].

31. *Id.* art. XXIII, para. 2 (claims by the ROK government), para. 5 (claims by third parties). Article XXIII, paragraph 5, applies to all "third parties" present in South Korea, to include aliens. See National Compensation Act, Law No. 1899, art. 7 (1967) (as amended) (S. Korea) [hereinafter National Compensation Act] ("This Act shall apply only in cases where a mutual guarantee exists, if an alien is a victim or a damage sufferer."); State Compensation Act, Act No. 1899, art. 7 (1967) (as amended) (S. Korea) (same) [hereinafter State Compensation Act].

32. See U.S. DEP'T OF ARMY, REG. 27-20, LEGAL SERVICES: CLAIMS, para. 7 (31 Dec. 1997) [hereinafter AR 27-20] (governing claims arising overseas under status of forces and other international agreements); U.S. DEP'T OF ARMY, PAM. 27-162, LEGAL SERVICES: CLAIMS, para. 7 (1 Apr. 1998) [hereinafter DA PAM 27-162] (same). The underlying statutory authority for Chapter 7 of AR 27-20 and DA PAM 27-162 is 10 U.S.C. § 2734a (2000).

33. Maneuver damage occurs when a servicemember causes property damage or personal injury, to include death, during a tactical exercise in the air or on the ground.

34. SOFA, *supra* note 30, art. XXIII, paras. 6, 7.

35. The SOFA excludes liability for non-scope claims arising from the acts or omissions of South Korean nationals or residents employed by the United States. *Id.* art. XXIII, para. 6.

National Compensation Act and the State Compensation Act, their implementing decrees, and other related laws provide the mechanism, procedures, and standards for the ROK MOJ to evaluate and adjudicate all SOFA claims. The acts each consist of seventeen articles that establish a Central Compensation Council (CCC) and several District Compensation Councils (DCC) to process and adjudicate claims.³⁷ The acts also address when lawsuits may be filed for compensation.³⁸

SOFA Scope Claims

To receive compensation for injury or property damages that occur from an act or omission by a U.S. service member or DOD civilian employee acting within scope, the claimant must file a claim with one of the DCCs located throughout Korea.³⁹ The claimant must indicate how his injury or damages occurred and also how much compensation he believes he is entitled to receive.⁴⁰ All claims must be submitted on Form 1.⁴¹ The employees at the DCC then prepare Forms 2 and 3⁴² and forward them to the Commander,⁴³ USAFCS-K.⁴⁴ From a practical standpoint, the DCC will usually check the box on Form 3 indicating the United States was wholly responsible for the incident in question. The DCC also indicates what percentage

of the damages it believes the United States is liable for (for example, 100%, 50%, or 0%), and forwards these two claims forms (within one week) via the MOJ to USAFCS-K for investigation by one of its six foreign claims investigators.⁴⁵

Once the USAFCS-K receives the claim, a claims examiner stamps the receiving date on the corner of Form 2 to track the processing time, and screens the claim for possible duplication. The examiner also translates and prepares a chronology sheet, establishes local cards and files, inputs information into the computer, and locates reports of investigation, such as Military Police reports, reports of investigations from the Criminal Investigation Division, Security Police reports, maneuver damage reports, and other pertinent information.⁴⁶ Cases are then distributed to the investigators at the USAFCS-K for investigation.

The investigators at USAFCS-K translate Forms 2 and 3 and review them carefully to see if a proper party claimant⁴⁷ filed the claim and to see if the forms have been properly classified as a SOFA scope or non-scope claim. If the investigator finds that the claim was improperly classified, he obtains verbal approval from the Commander to coordinate with the DCC for proper classification of the claim.⁴⁸ The Commander will

36. The SOFA states that with regard to non-scope claims, the "authorities of the Republic of Korea shall consider the claim and assess compensation . . ." *Id.* It is the ROK Ministry of Justice, through its Compensation Council, that is responsible for processing these claims. National Compensation Act, *supra* note 31, art. 10; State Compensation Act, *supra* note 31, art. 10. See also CLAIMS SECTION, SOUTH KOREAN MINISTRY OF JUSTICE, HANDBOOK OF CLAIMS AFFAIRS, 1991 [hereinafter HANDBOOK OF CLAIMS AFFAIRS]. Employees of the MOJ and the U.S. Armed Forces Claims Service, Korea (USAFCS-K) refer to this text for procedural guidance when processing SOFA claims. There is no English translation of this manual.

37. National Compensation Act, *supra* note 31, art. 10; State Compensation Act, *supra* note 31, art. 10.

38. Article 9 of the State Compensation Act provides that lawsuits for compensation of damages may be filed after the Compensation Council makes a decision to pay or reject compensation or if no decision is made within three months after the claim is filed. State Compensation Act, *supra* note 31, art. 9. See HANDBOOK OF CLAIMS AFFAIRS, *supra* note 36, at 804.

39. As of August 1999, the DCC were located at Seoul, Incheon, Suwon, Chunchon, Chonju, Taejon, Taegu, Pusan, Ulsan, Changwon, Kwangju, Jonju, and Cheju, with the CCC at the Ministry of National Defense.

40. HANDBOOK OF CLAIMS AFFAIRS, *supra* note 36, at 813, 815.

41. S. Kor. Ministry of Justice, Form 1, Claims for Damage or Injury, *reprinted in* HANDBOOK OF CLAIMS AFFAIRS, *supra* note 36, at 212. This form requires the claimant to indicate information such as the names of the individuals involved in the incident, a brief description of the incident, the amount of the claim, and the basis for the amount of the claim.

42. S. Kor. Ministry of Justice, Form 2, Claims Notice/Incident Certificate Under Article XXIII, Status of Forces Agreement, *reprinted in* HANDBOOK OF CLAIMS AFFAIRS, *supra* note 36, at 214. Form 2 briefly describes the incident and the amount of compensation the claimant is seeking. Form 3 is used to document the DCC's determination as to whether the incident occurred in the performance of official duty. S. Kor. Ministry of Justice, Form 3, Certificate of Scope of Employment and Degree of Fault Under Article XXIII, Status of Forces Agreement, *reprinted in* HANDBOOK OF CLAIMS AFFAIRS, *supra* note 36, at 216.

43. A U.S. Army judge advocate serves as the Commander of the USAFCS-K. This claims office is responsible for processing all SOFA claims in Korea. Working for the Commander are one claims examiner, who receives the SOFA claims, and six SOFA claims investigators. The office is also authorized a Chief of SOFA claims who would be responsible for overseeing the entire SOFA section. As of the time of the writing of this note, the position was vacant.

44. See HANDBOOK OF CLAIMS AFFAIRS, *supra* note 36, at 815, 817. The ROK MOJ makes the initial determination of scope of employment and liability. The MOJ or its compensation councils will forward these findings to the Commander, USAFCS-K. If the parties cannot agree on scope and liability, the matter will be brought before a working group of the Civil Jurisdiction Subcommittee for Claims.

45. *Id.* Upon receipt of a claim by the ROK MOJ or one of its receiving councils, the ROK shall immediately advise the Commander, USAFCS-K, of each claim received by utilizing Form 2.

46. UNITED STATES ARMED FORCES CLAIMS SERVICE-KOREA, STANDARD OPERATING PROCEDURE: FOREIGN CLAIMS ADMINISTRATION 1 (1997) [hereinafter ADMINISTRATION SOP].

acknowledge receipt of the claim by completing that portion of Form 2 reserved for his action and shall return a completed Form 2 to the initiating DCC through the MOJ.⁴⁹

The ROK and the United States, either independently or jointly, will investigate the facts and circumstances of the incident that gave rise to the claim, including conducting on-scene investigations.⁵⁰ The investigators review investigative reports and make appropriate telephone calls to the concerned jurisdictional Provost Marshal's Office, Criminal Investigative Division, Civil Affairs Office, or concerned unit to verify the name, rank, and organization of the U.S. service member or employee involved. The investigators, upon completing the investigation and making a thorough review and analysis of the various reports, make a final recommendation indicating the percentage of liability of the United States and of the claimant. They determine whether there is any negligence involved on the part of the claimant or victim of the incident.⁵¹ The Commander, based on the results of the investigation, signs the claims forms and either certifies or denies United States involvement.

If the United States determines there was contributory negligence on the part of the victim or claimant, the investigators prepare a draft letter for the Commander indicating the percentage of liability, and forward this letter with Forms 2 and 3 to the appropriate DCC through the MOJ.⁵² Upon receipt of the letter and two forms, the DCC determines how much, if any, compensation the claimant is entitled to receive, reducing the potential

award by the percentage amount of liability imputed to the claimant. For instance, if the claimant produces receipts totaling 5,000,000 won, and the DCC concludes that the claimant was 30% liable for the accident, the DCC will award only 3,500,000 won.⁵³ In cases of damaged or destroyed property, the DCC's determination of compensation is based upon the cost to repair or replace the property. In cases of personal injury, compensation is based upon the cost of medical treatment, lost wages, physical handicap, and pain and suffering. In cases of death, compensation includes funeral expenses and bereaved family compensation (the future wages of the victim). Pain and suffering is also paid to the victim's family. The amount of pain and suffering to be paid to each family member is determined by statutory guidelines.⁵⁴

The ROK DCC will advise the Commander, USAFCS-K, of the amount of compensation decided in all official duty cases by utilizing Form 4.⁵⁵ The Commander promptly communicates his agreement or disagreement on Form 4, with explanation. In instances where agreement cannot be obtained with respect to an award, the Commander will send Form 4 back to the DCC via the MOJ for reassessment.⁵⁶ Once an amount is agreed to, an offer is made to the claimant. The claimant may accept or reject the offer. If the claimant accepts the offer, he receives payment in full and final satisfaction of his claim.⁵⁷ Claims will be adjudicated and settled by the ROK DCC and forwarded to USAFCS-K with one copy of Form 8⁵⁸ properly executed by the claimant or his authorized representative.⁵⁹

47. Proper party claimants (called third parties) under the SOFA are anyone other than members of the force, civilian employees of the force (except those ordinarily resident in South Korea), and their dependents. SOFA, *supra* note 30, art. XXIII, para. 5.

48. UNITED STATES ARMED FORCES CLAIMS SERVICE-KOREA, STANDARD OPERATING PROCEDURE: FOREIGN CLAIMS INVESTIGATOR 2 (1997) [hereinafter INVESTIGATOR SOP].

49. ADMINISTRATION SOP, *supra* note 46, at 2.

50. *Id.*

51. *Id.*

52. *Id.*

53. Won is the South Korean currency. The ROK and the United States will use the rate of exchange in effect when a claimant files his claim. At the time that this article was written, the won rate was 1,113 won to the U.S. dollar. Thus a claim for 5,000,000 won was equivalent to approximately \$4,492. The 3,500,000 won award is 70% of the amount claimed and the determined amount of U.S. liability.

54. ADMINISTRATION SOP, *supra* note 46, at 3.

55. S. Kor. Ministry of Justice, Form 4, Notice of Decision and Proposed Distribution Under Article XXIII, Status of Forces Agreement, *reprinted in* HANDBOOK OF CLAIMS AFFAIRS, *supra* note 36, at 218.

56. Memorandum, Republic of Korea—United States Civil Jurisdiction (Claims) Subcommittee, to The Joint Committee, subject: Revision of the Procedures and Forms Implementing the Processing of Claims Under Article XXIII of SOFA as Assigned by the 51st Meeting of the Joint Committee on 18 June 1970 (4 May 1971) [hereinafter Subcommittee Memorandum] (containing the official minutes of the subcommittee titled: Procedures for the Implementation of Paragraphs 5, 6, and 7, Article XXIII (Claims), ROK—U.S. Status of Forces Agreement). If the matter cannot be resolved, the case will be placed on an agenda for discussion by a joint working panel of the ROK—U.S. Civil Jurisdiction (Claims) Subcommittee.

57. HANDBOOK OF CLAIMS AFFAIRS, *supra* note 36, at 833.

58. S. Kor. Ministry of Justice, Form 8, Receipt, *reprinted in* HANDBOOK OF CLAIMS AFFAIRS, *supra* note 36, at 225.

59. HANDBOOK OF CLAIMS AFFAIRS, *supra* note 36, at 833.

At any time before the claimant has actually been paid for a SOFA scope claim, the claimant may choose to file suit in a South Korean district court to have the claim settled.⁶⁰ If that happens, the DCC is no longer involved in adjudicating the claim and will dismiss Form 4.⁶¹ If the court renders a judgment in favor of the claimant the USAFCS-K must honor the court decision. The court will notify the USAFCS-K of the amount paid to the claimant by way of Form 5.⁶² The claims investigators translate the entire file, along with Form 5, and the Commander, USAFCS-K, acknowledges receipt and returns the completed form to the ROK MOJ.⁶³

Every six months, the ROK sends the United States a request for reimbursement of the amounts paid to all claimants.⁶⁴ Upon receipt of the request, a claims examiner reviews every claims file to determine whether the amount paid by the ROK and the amount apportioned to the United States are correct. If correct, the examiner prepares vouchers for payment of the requested amounts and forwards them to the servicing finance and accounting office.⁶⁵ According to the cost-sharing provisions of the SOFA, in cases where the United States is solely liable for the claim, it reimburses the Korean government 75% of the amount paid.⁶⁶ Where the United States and the ROK are jointly liable, or when it is not possible to ascertain relative liability, the amount awarded is distributed equally.⁶⁷ Claims decided by the courts are included in the requests for reimbursement. In accordance with the SOFA, the United States will effect reimbursement with the least practicable delay to the

National Treasury of the ROK and notify the MOJ of reimbursement.⁶⁸

SOFA Non-Scope Claims

Claims against employees of the U.S. armed forces arising out of negligent or wrongful acts or omissions not done in the performance of official duties are non-scope claims and are also addressed in Article XXIII of the SOFA.⁶⁹ As with SOFA scope claims, non-scope claims are filed with the appropriate DCC. The DCC reviews and generally processes the claim the same way it processes scope claims.⁷⁰ Again, the DCC will prepare Forms 2 and 3 and will forward them via the MOJ to the USAFCS-K.⁷¹ Non-scope claims are logged in and investigated just as SOFA scope claims are.⁷² Upon determination that a claim is a non-scope claim, the Commander, USAFCS-K, signs and returns Form 3 to the DCC with the box checked indicating the offender was not acting in the performance of official duty. The forms are often returned with a letter explaining why USAFCS-K believes the claim is a non-scope claim. Once Forms 2 and 3 are returned to the DCC, the DCC will finalize its investigation and make an advisory adjudication of the claim on Form 6⁷³ and forward it to the USAFCS-K through the MOJ.⁷⁴ Following adjudication by the USAFCS-K and settlement,⁷⁵ the Commander signs and completes that portion of the appropriate form reserved for his action and returns the completed form to the ROK MOJ.

60. National Compensation Act, *supra* note 31, art. 9; State Compensation Act, *supra* note 31, art. 9.

61. HANDBOOK OF CLAIMS AFFAIRS, *supra* note 36, at 831.

62. S. Kor. Ministry of Justice, Form 5, Payment Statement and Proposed Distribution Resulting from Court Order Under Article XXIII, Status of Forces Agreement, *reprinted in* HANDBOOK OF CLAIMS AFFAIRS, *supra* note 36, at 220.

63. HANDBOOK OF CLAIMS AFFAIRS, *supra* note 36, at 831.

64. SOFA, *supra* note 30, art. XXIII, para. 5(e)(iii). Pursuant to the cost sharing provisions of the SOFA, the ROK requests reimbursement of a portion of all money paid, using Forms 9 and 10. S. Kor. Ministry of Justice, Form 9, Reimbursement Request Under Article XXIII, Status of Forces Agreement, and Form 10, Request List of Claims, *reprinted in* HANDBOOK OF CLAIMS AFFAIRS, *supra* note 36, at 226-27.

65. HANDBOOK OF CLAIMS AFFAIRS, *supra* note 36, at 835.

66. SOFA, *supra* note 30, art. XXIII, para. 5(e)(i).

67. *Id.* art. XXIII, para. 5(e)(ii).

68. *Id.* art. XXIII, para. 5(e)(iii).

69. *Id.* art. XXIII, para. 6.

70. HANDBOOK OF CLAIMS AFFAIRS, *supra* note 36, at 813, 815.

71. *Id.* at 815, 817.

72. ADMINISTRATION SOP, *supra* note 46, at 1.

73. S. Kor. Ministry of Justice, Form 6, Ex-Gratia Payment Report, *reprinted in* HANDBOOK OF CLAIMS AFFAIRS, *supra* note 36, at 222.

74. INVESTIGATOR SOP, *supra* note 48, at 1.

Pursuant to the Foreign Claims Act (FCA),⁷⁶ a Foreign Claims Commission (FCC) adjudicates non-scope claims.⁷⁷ Based on its investigation, the FCC may: choose to award the claimant the amount the DCC recommends; award more or less than the DCC recommends; or deny the claim.⁷⁸ The amount of compensation to be awarded, if any, is determined in the same manner as compensation for SOFA scope claims. The FCC, without delay, will render an opinion detailing its decision and, for meritorious claims, the claimant will be offered an ex-gratia payment in full satisfaction of the claim.⁷⁹

Timeline for Processing Claims

SOFA Scope Claims

The *Handbook of Claims Affairs* sets forth procedural guidance for the processing of SOFA claims. While there is great flexibility built into the system for processing both scope and non-scope claims,⁸⁰ some timelines must be met to ensure that these claims are processed to completion. When a claim is received by one of the DCCs, it must be registered, logged in, and assigned a claim number within one day. Forms 2 and 3 must be forwarded to the USAFCS-K via the MOJ within one week.⁸¹ The DCC sends the forms to the MOJ and the USAFCS-K investigators pick them up weekly. Once the claim is received at the USAFCS-K, it takes approximately three to four days to administratively process the claim, which includes

preparing chronology sheets, entering the information into the computer, and logging in the information.⁸² The investigation of the case may take one day to several months to complete, depending on the complexity of the case. Some complex cases have taken more than one year to investigate.⁸³

Completed Forms 2 and 3 and other necessary documentation are delivered to the MOJ. The MOJ sends information to each DCC throughout South Korea. Form 4 must be forwarded to USAFCS-K via the MOJ within three days.⁸⁴ Investigators review the MOJ's determination of scope or non-scope and the assessment of liability, indicating whether they agree with the MOJ's assessment. This takes two or three days for a simple case or months for a more complex case.⁸⁵ If there is disagreement, further investigation may be required. This may take several additional months.⁸⁶ If the MOJ does not receive Form 4 within two months, it will assume USAFCS-K agrees with the assessment and notify the claimant of the assessment.⁸⁷ If the USAFCS-K agrees and the amount is under 4,000,000 won, the SOFA claims investigator is authorized to sign the appropriate documentation. If the amount is 4,000,000 won or more, the Commander, USAFCS-K, will sign the documentation.⁸⁸ If the monetary amount is over 50,000,000 won, the DCC will not accept the claim. Instead, it will transfer the claim to the CCC at the MOJ, which makes assessments every three months.⁸⁹ The MOJ forwards documentation to USAFCS-K and the claim will be processed as previously discussed.⁹⁰ Once the DCC sends the claim assessment to the claimant and obtains agree-

75. There is no cost sharing provision for the payment of non-scope claims. The U.S. encourages the private settlement of claims by U.S. service members. In many instances this does not happen because the service member does not have adequate insurance coverage or is insolvent. The U.S. will pay 100% of the settlement amount for non-scope claims when it is determined to be in the best interest of the United States to pay such claims. In some instances, the United States will attempt to get restitution of the settled amount.

76. 10 U.S.C. § 2734 (2000) (implemented by AR 27-20, *supra* note 4, ch. 10).

77. See AR 27-20, *supra* note 32, para. 10-6. A FCC will process SOFA non-scope claims in Korea regardless of the amount claimed. A FCC is composed of one or three members, two of whom are judge advocates or claims attorneys, and it is responsible for the investigation of all claims referred to it. The senior judge advocate of a command having a command claims service will appoint necessary FCCs to act on claims arising within his geographical area of jurisdiction.

78. 10 U.S.C. § 2734. When the claim is valued at more than \$50,000 or all claims arising out of a single incident are valued at more than \$100,000, the file will be transferred to the Commander, United States Army Claims Service (USARCS), Fort Meade, Maryland. The USARCS is responsible for overseeing all of the Army claims offices. Note that the Commander, USARCS, may authorize the FCC to negotiate settlement amounts that exceed the FCC's authority.

79. SOFA, *supra* note 30, art. XXIII, para. 6(b)-(c). Form 6 is then returned to the DCC. HANDBOOK OF CLAIMS AFFAIRS, *supra* note 36, at 841.

80. In calendar year 1999, SOFA investigators at the USAFCS-K processed 455 scope claims and thirty non-scope claims.

81. HANDBOOK OF CLAIMS AFFAIRS, *supra* note 36, at 817.

82. INVESTIGATOR SOP, *supra* note 48, at 1.

83. Interview with Mrs. Yi, Myo Sang, SOFA Claims Investigator, USAFCS-K (Feb. 11, 2000) [hereinafter Yi Interview].

84. HANDBOOK OF CLAIMS AFFAIRS, *supra* note 36, at 825.

85. Yi Interview, *supra* note 83.

86. *Id.*

87. HANDBOOK OF CLAIMS AFFAIRS, *supra* note 36, at 827.

88. INVESTIGATOR SOP, *supra* note 48, at 1.

ment on the claimed amount, the DCCs have to report to the MOJ by the fifth day of the following month that they made payment to the claimant, and forward USAFCS-K a copy of Form 8.⁹¹

SOFA Non-Scope Claims

The process and timelines for handling Forms 2 and 3 in SOFA non-scope claims is the same as for scope claims. If the claim is determined to be a non-scope claim, the ROK DCC will accept and prepare Form 6.⁹² Once the USAFCS-K receives this information, the assigned investigator translates all documents, investigates, and recommends assessment.⁹³ If the claim is less than \$50,000, the claim is adjudicated in-house. If the amount is over \$50,000, after the investigator obtains a settlement agreement from the claimant and translates the entire file, the claim is forwarded to the U.S. Army Claims Service (USARCS) at Fort Meade.⁹⁴

Current USAFCS-K Initiatives on Streamlining the SOFA Claims Process

The lengthy time period for processing SOFA claims is a source of concern for both the United States and the ROK. The average processing time for SOFA scope claims is presently five to six months. The processing of SOFA non-scope claims may take considerably longer. Both governments want to ensure the speedy compensation of victims as the payment of SOFA claims may directly affect the relations between the two countries.⁹⁵ Also, the payment of SOFA claims prior to trial may be a mitigating factor in ROK criminal cases involving U.S. service members. To streamline the SOFA claims process in Korea, both the U.S. and the ROK governments must review the current system and identify weaknesses. The USAFCS-K

is presently reviewing the process and is exploring the following initiatives.

Processing delays frequently occur with the DCCs. In the outlying areas of Korea, some DCCs meet once a quarter and others meet on an as-needed basis. To date, no action has been taken to formally change the scheduled meeting times. The USAFCS-K has recommended, however, more frequent meetings of the DCCs to prevent a backlog of SOFA claims requiring action.⁹⁶ Claims that are over 50,000,000 won are currently transferred to the CCC at the MOJ. This committee makes assessments every three months. This time schedule creates a significant delay in the processing of the claims. The USAFCS-K has recommended that the Central Compensation Committee responsible for processing claims over 50,000,000 won be required to meet on a monthly basis. Although this would help the U.S. government and the ROK claimant, it is foreseeable that this initiative would increase costs to the ROK government.⁹⁷ As a result, this recommendation is not likely to be adopted.

In most instances, Forms 2 and 3 are forwarded from the DCCs located in the outlying areas through the MOJ to the USAFCS-K without supporting documentation. The USAFCS-K SOFA investigators must make specific requests for information. This is usually done on a piecemeal basis as the cases are developed. The USAFCS-K is currently addressing the issue of direct filing with the MOJ. The USAFCS-K would then forward appropriate documentation to the MOJ with recommendations for approval of advance payment to victims if appropriate. The MOJ could then determine whether the case would need to be forwarded to the DCC. If this initiative is not feasible, the U.S. and the ROK should revise the U.S.-ROK Joint Committee minutes to require DCCs to include all necessary supporting documentation for processing claims.⁹⁸ At a minimum, the DCC should continuously train SOFA clerks

89. HANDBOOK OF CLAIMS AFFAIRS, *supra* note 36, at 666, 668.

90. See *supra* notes 39-68 and accompanying text discussing the processing of SOFA scope claims.

91. HANDBOOK OF CLAIMS AFFAIRS, *supra* note 36, at 835.

92. *Id.* at 841.

93. INVESTIGATOR SOP, *supra* note 48, at 1.

94. See AR 27-20, *supra* note 32, para. 10-6f(5). Investigators have to obtain a payment agreement from the claimant before the claim is forwarded to USARCS.

95. Quickly processing SOFA claims shows our desire to maintain an amicable relationship with the ROK and reduces the source of confusion for the claimants. Cases involving excessive property damage or severe personal injury may be closely scrutinized and receive heightened media coverage. Receiving negative media coverage could result in increased anti-American sentiments in the ROK.

96. Interview with Mrs. Pak, Suk Cha, SOFA claims investigator, USAFCS-K (May 8, 2000) [hereinafter Pak Interview]. This matter was recently addressed during a working committee meeting between the USAFCS-K and members of the MOJ. While requiring more frequent meetings of the DCCs would help expedite the process, there appear to be budgetary concerns. The ROK has to pay the Commissioner to attend all meetings. Also, the council members have full-time employment and must be properly compensated by the ROK for their services.

97. The ROK has to pay members of the DCC to attend its meetings. It would increase the ROK's costs to have the members meet more frequently. In addition to increased labor costs, the ROK would have to absorb the increased costs for office operations and management costs.

in the DCCs on Forms 2 and 3 and create standard operating procedures (SOPs) for employees' use.⁹⁹

Another initiative involves persuading the ROK government to devise an expedited claims process through each local DCC for processing claims under 2,000,000 won. In cases involving traffic accidents and maneuver damage (such as crop damage) where the United States admits 100% liability, or in cases where the U.S. government and the ROK agree to the degree of comparative negligence, Forms 2 and 3 may be utilized without using Form 4.¹⁰⁰ This will expedite the processing of these claims. Also, creating a centralized compensation committee for handling only traffic accidents will expedite the claims process.¹⁰¹

Presently, the United States only makes advance payments to claimants in SOFA non-scope cases.¹⁰² Another claims initiative includes the United States lobbying for advance payments to claimants in SOFA scope cases involving death or serious bodily injury.¹⁰³ As earlier mentioned, the South Korean State Compensation Act allows for such payments.¹⁰⁴ If implemented, this change will promote good relations between the U.S. and ROK governments.

Conclusion

As long as U.S. service members and DOD civilian employees are present in Korea, it is inevitable that their presence will result in property damage and personal injury to local Korean citizens. These incidents may have an adverse impact on U.S.–Korean relations if the U.S. government does not properly han-

dle them. Presently, the SOFA claims system is cumbersome and outdated. While employees of the USAFCS-K and the ROK MOJ both strive to make timely payments to claimants, both need to do a better job of deleting the unnecessary and time-consuming steps involved in the claims process.

The only way to ensure that all claimants are paid as quickly and as efficiently as possible is to continuously review the way that the U.S. and the ROK conduct business and to look for viable ways to streamline the process. In response to the concerns that have been raised by the senior JAGC leadership,¹⁰⁵ the Commander, USAFCS-K, has established a working group with members of the MOJ to discuss ways to expedite the claims process, including some of the streamlining suggestions presented in this note.¹⁰⁶ As of the writing of this note, the Commander, USAFCS-K, and SOFA investigators have held two meetings with members of the MOJ to discuss ways to improve and simplify the SOFA claims process in Korea. It is expected that these meetings will yield positive results that will have a far-reaching impact on the SOFA claims process in Korea.¹⁰⁷ In the meantime, Judge Advocates dealing with the SOFA claims process in Korea should always be mindful of the sensitive nature of these cases as they may directly affect U.S.–Korean relations. Judge advocates should instruct the claims staff to assist the claimants as much as possible by providing appropriate guidance and, if requests are made, updating claimants on the status of their claims to avoid confusion. Finally, judge advocates can greatly assist the Commander, USAFCS-K, by identifying internal procedures that may cause processing delays and providing input on how to enhance these SOFA claims processing procedures.

98. See Subcommittee Memorandum, *supra* note 56. Also, clerks should include all of the claimant's information, such as address, telephone number, and other identifying data, on the Form 1. This will ensure that SOFA investigators are able to contact claimants as quickly as possible.

99. Pak Interview, *supra* note 96. Clerks at the DCCs routinely rotate to new positions every year with little or no overlap of training time. Continuous training of SOFA clerks by the ROK may also have fiscal implications, but developing a standard SOP or training binder and requiring new employees to read it should not.

100. Interview with Lieutenant Colonel Gary D. Hyder, Commander, USAFCS-K (May 10, 2000). Lieutenant Colonel Hyder has been the Commander of the USAFCS-K since August 1998. During his tenure, he has dealt with a cumbersome SOFA claims process. He is presently heading the USAFCS-K joint working group responsible for negotiating with the Korean MOJ to streamline the SOFA claims process. This is the first time since 1971 that any change to the processing of SOFA claims by the MOJ has been proposed.

101. Most of the SOFA scope claims processed involve claims filed for compensation of personal injury or property damage resulting from traffic accidents. Generally, these claims are the more routine ones and the DCCs can expeditiously resolve these cases.

102. Presently, the ROK government bears at least 25% of the entire payment in SOFA scope cases. The ROK does not include advance payments in the entire payment amount. If the U.S. government makes an advance payment, it would lose its share of this portion because it would not be reimbursed by the ROK.

103. These cases are politically sensitive and involve emotionally traumatic events.

104. See National Compensation Act, *supra* note 31, art. 13(2); State Compensation Act, *supra* note 31, art. 13(2) (providing for advance payments to claimants).

105. Colonel Uldric L. Fiore, Jr. is the former Judge Advocate for Headquarters, United Nations Command/U.S. Forces Korea/Eighth U.S. Army. He was very concerned about the amount of time that it currently takes to process SOFA claims. On March 10, 2000, he met with key members of the MOJ to discuss ways of expediting the claims process. This historic meeting prompted the formation of the working groups consisting of members of the USAFCS-K and key members of the MOJ.

106. Also, the Commander, USAFCS-K, continuously reviews internal procedures to identify ways to further enhance the way the military claims office conducts business.

107. The author would like to thank Major Holly O. Cook for her helpful comments and patience in the development of this note.